In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1360

DONALD M. PETERSON, PETITIONER

v.

BLUE CROSS/BLUE SHIELD OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-7)[1] is reported at 508 F.2d 55.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1975. A timely petition for rehearing was denied on March 26, 1975 (Supp. App. A-12). The petition for a writ of certiorari was filed on April 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner has filed two documents with the Court in this case, a petition for a writ of certiorari and an "Appendix to Petition." "Pet. App." refers to the appendix contained in the former document, "Supp. App." to the latter document.

QUESTIONS PRESENTED

1. Whether the district court properly removed these cases from the state court, pursuant to 28 U.S.C. 1442 (a)(1).

2. Whether these suits are barred by the doctrine of governmental immunity.

3. Whether the decision of the court of appeals in these cases is inconsistent with its decisions in other companion cases.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The relevant portions of the Fifth Amendment to the Constitution and of the removal statute, 42 U.S.C. 1442 (a)(1), are set forth at Pet. 4-5.

STATEMENT

This is one of two companion cases (see *Petersen v. Weinberger*, No. 74-1442, petition for a writ of certiorari filed May 16, 1975), both of which rest upon essentially the same factual basis.

In July 1969, the Department of Health, Education, and Welfare ("HEW") received a complaint questioning Medicare Act payments to petitioner for services not rendered by him (Pet. App. A-23). Its investigation revealed that during the first six months of 1968, Concord Manor Nursing Home, an extended care facility owned by James E. Peterson, petitioner's brother, submitted bill for physical therapy services rendered to patients in its care by a physical therapist employed by Zodiac, Inc., another corporation owned by James E. Peterson (Pet. App. A-10 to A-11).

At the time these services were rendered, payment for physical therapy services could not be made to Zodiac but could be made only to Concord as a "provider of services" (see 42 U.S.C. 1395x(u)) within the meaning of Part A of

the Medicare Act, 42 U.S.C. 1395c, *et seq.*[2] Such payments are limited to the "reasonable cost" of such services. 42 U.S.C. 1395f(b). The bills were submitted by Concord to the organizations that served as "fiscal intermediaries"[3] for HEW[4] (Pet. App. A-10).

Prior to the payment of these bills, Concord was suspended from the Medicare Part A program for failure to file required cost reports with HEW (Pet. App. A-21). In order to obtain payment despite the suspension of Concord, James Peterson determined to submit bills for the same services to HEW pursuant to Medicare Part B, 42 U.S.C. 1395j to 1395w (*ibid.*).[5] Under this portion of the program, payment could be made only if the services were provided by a physician or under his personal direction (Pet. App. A-21 to A-22). Accordingly, James Peterson directed his employees to affix petitioner's signature to the certification, contained on Part B forms, that the services had been rendered by petitioner or under his personal supervision (*ibid.*).

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[2]Part A of the program is designed to provide "basic protection against the costs of hospital and related post-hospital services * * * for individuals who are age 65 or over * * *." 42 U.S.C. 1395c.

[3]Blue Cross/Blue Shield of Texas, Travelers Insurance Company, and Group Medical & Surgical Services are the fiscal intermediaries or "carriers" involved in this case (Pet. App. A-3).

[4]Pursuant to 42 U.S.C. 1395h, a provider of services may nominate a private organization, here Mutual of Omaha, to act as a "fiscal intermediary." If the intermediary then enters into an agreement with the Secretary, the provider submits its bills to the intermediary, who is responsible for their payment as agent for the Secretary. 42 U.S.C. 1395h(a).

[5]Medicare Part B is a voluntary health insurance program financed in part by premiums paid by beneficiaries and in part by the federal government. 42 U.S.C. 1395j. The program is designed to assist beneficiaries in the payment of health care provided by physicians.

These forms were submitted to the organizations that act as "carriers" for the Secretary under Part B of Medicare.[6] Payment was made to petitioner by check on the basis of the "reasonable charge" (42 U.S.C. 1395*l*(a)(1)) for the services.[7] Petitioner deposited the checks in his personal account and sent a personal check to James Peterson, who deposited it in the Zodiac account (Pet. App. A-22). Subsequently, petitioner received, but did not pay, six invoices from Zodiac for therapy services rendered during the first six months of 1968 at Concord (Pet. App. A-23).

As a result of the investigation and because of the possibility of fraud, in December 1969 the Secretary issued a letter to the carriers under Part B ordering suspension of further payments to petitioner under the Medicare program (Pet. App. A-24).[8]

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[6]Pursuant to the Act, the Secretary may enter into agreements with private organizations to serve as "carriers" under Part B. 42 U.S.C. 1395u. The carriers perform certain specified functions, including the making of determinations of the rate of payment and the making of payments.

[7]Unlike Medicare Part A, where payment is made upon the basis of "reasonable cost" (42 U.S.C. 1395f(b)), payment under Part B is made upon the basis of the "reasonable charge" for the service (42 U.S.C. 1395*l*(a)(1)).

[8]This notice had the additional effect of suspending payments to petitioner by Group Hospital Services, Inc., an organization that administers payments under the Texas Medicaid program. Established under Title XIX of the Social Security Act, 42 U.S.C. 1396, *et seq.*, Medicaid is a joint federal-state program providing for federal grants to the states for the purpose of providing medical assistance to families with dependent children and aged, blind, or permanently disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. 1396a.

In September 1971, petitioner instituted suit in the United States District Court for the Northern District of Texas, against the United States, the Secretary, the Attorney General, and most of the named respondents here, seeking injunctive relief and damages for alleged breach of contract and tortious conduct in connection with his suspension from the Medicare program (Pet. App. A-3).[9] The government counterclaimed against petitioner and filed a third-party complaint against James Peterson, seeking damages under the False Claims Act, 31 U.S.C. 231. The district court denied petitioner relief and awarded damages to the government on its counterclaim and third-party complaint.

The court of appeals affirmed. It held that petitioner had failed to prove a claim for either breach of contract or tort, that the defendants were officially immune from liability, and that the petitioner and James Peterson had submitted false claims to the United States (Pet. App. A-19 to A-39; *Peterson* v. *Weinberger*, 508 F.2d 45, pending on petition for a writ of certiorari, No. 74-1442).

Thereafter, in February 1973, petitioner and James Peterson were indicted for making false statements to the United States, in violation of 18 U.S.C. 1001, and conspiracy to do so, in violation of 18 U.S.C. 371. After a jury trial, James Peterson was found guilty on all counts. Petitioner was convicted only on the conspiracy count (Pet. App. A-9). The court of appeals affirmed the conviction of James Peterson for violation of 18 U.S.C. 1001, but reversed both conspiracy convictions (Pet. App. A-8 to A-17; 488 F.2d 645).

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[9]The district court ordered the defendants to pay petitioner the funds due him conditioned upon his payment of a bond (Pet. App. A-27).

In May 1973, petitioner filed, in a Texas state court, the two complaints involved in this case. Except for the addition of a count alleging malicious prosecution and the addition, as defendants, of the Vice-President of Blue Cross of Texas and two HEW attorneys, the claims in the first suit were identical to those litigated in petitioner's 1971 federal suit (Pet. App. A-3).[10] The claims in the second complaint were essentially identical to those made against the corporate respondents by petitioner in 1971; it was a "protective" suit, filed in case the federal district court found that it lacked jurisdiction over those corporate defendants (*ibid.*).

Petitions for removal were filed by the defendants and granted by the district court (*id.* at A-4). The district court determined that the issues presented were identical to those litigated in petitioner's earlier suit and held that petitioner's new lawsuits were barred by *res judicata* (*ibid.*). On consolidated appeals, the court of appeals affirmed (Pet. App. A-2 to A-7). The court did not address the question of *res judicata*, but held that the defendants possessed governmental immunity from liability (Pet. App. A-5 to A-7).

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[10]The HEW officials common to the suits were the regional representative responsible for administering the Medicare program in Texas and four other states, the person responsible for supervising all fraud and abuse cases, a program integrity specialist responsible for investigating claims of fraud or abuse and recommending whether to prosecute, and another program integrity staff worker; the additional parties in this case are the regional counsel and assistant regional counsel (Pet. App. A-3, A-28).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the removal statute, 28 U.S.C. 1442(a)(1),[11] only authorizes removal when an officer of the United States or person acting under him is sued for an act under color of such office committed "*either* in apprehension or punishment of criminals *or* in collection of revenues" (Pet. 9; emphasis in original). Petitioner's narrow reading of the removal statute, however, is contrary to the settled decisions of this Court and of the courts of appeals, which have upheld the action of district courts in granting removal, in cases other than criminal prosecutions or tax proceedings, where the defendants, as here, were sued for acting under color of office. See, *e.g.*, *Willingham* v. *Morgan*, 395 U.S. 402; *Murphy* v. *Kodz*, 351 F.2d 163, 165 (C.A. 9); *Poss* v. *Lieberman*, 299 F.2d 358, 359 (C.A. 2), certiorari denied, 370 U.S. 944.[12]

2. Petitioner argues (Pet. 12-13) that the court of appeals erred in holding all respondents immune from liability. In the 1971 suit, after a trial extending five days,

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[11]Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[12]Petitioner contends that one of the corporate respondents, Group Hospital Services, Inc., was acting pursuant to a contract with the State of Texas and was thus not entitled to removal (Pet. 10). Even if that respondent were not entitled to removal if named as the sole defendant, that would not bar removal when a federal officer or agent entitled to removal is also named as a defendant, for it is the entire suit that is removed to the federal court. *E.g.*, *Allman* v. *Hanley*, 302 F.2d 559, 562 (C.A. 5); *Bradford* v. *Harding*, 284 F.2d 307, 309-310 (C.A. 2).

the district court held that the action was barred by the doctrine of governmental immunity (Pet. App. A-28 to A-31). The court of appeals agreed, noting that "[t]here is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities" (Pet. App. A-29).[13] In the instant case, the court of appeals held that its conclusion concerning governmental immunity in the 1971 case was "fully applicable here" (Pet. App. A-7). As we discuss further in our opposition in No. 74-1442 (see p. 5, *supra*), that determination was correct and does not warrant further review. See *Barr* v. *Matteo*, 360 U.S. 564; cf. *Scheuer* v. *Rhodes*, 416 U.S. 232; *Wood* v. *Strickland*, No. 73-1285, decided February 25, 1975, slip op. 13-14.[14]

3. Petitioner's assertions (Pet. 13-15) that the court of appeals' affirmance here was inconsistent with its earlier reversal of his conviction for conspiracy, and that the court improperly relied upon its decision in his related 1971 action, are insubstantial.[15] Petitioner's acquittal does not establish the tortious conduct that he alleges in his complaint.

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[13]Petitioner appears to contend (Pet. 12) that the doctrine of governmental immunity is not applicable here because "the defendants are field investigators and their co-conspirators." The court of appeals correctly rejected this contention (Pet. App. A-29 to A-30).

[14]In any event, the correctness of the court of appeals' ruling on immunity need not be considered in this case because the judgment could be sustained on the ground of *res judicata* on which the district court relied. Petitioner is not entitled to relitigate the same issues merely by joining as defendants additional employees of the Secretary or his agents who carried out the acts that underlay petitioner's contentions in the 1971 suit (Pet. App. A-5). See *Baldwin* v. *Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 525.

[15]We address petitioner's related contention, that the court of appeals' decision in his 1971 suit also was inconsistent with his acquittal of conspiracy, in our opposition to his petition in No. 74-1442.

Moreover, the court of appeals correctly relied here upon its holding, in the 1971 action, that the respondents possessed official immunity from suit. Petitioner has not shown any differences in the factual bases for that suit and the present suits that would justify a different ruling here on the question of immunity nor any reason why the rationale of the court's opinion in his 1971 suit does not properly extend to the additional parties added as defendants here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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